

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 6 February 2014

Public Authority: Port of London Authority
Address: London River House
Royal Pier Road
Gravesend
Kent
DA12 2BG

Decision (including any steps ordered)

1. This decision notice concerns a request for information made by Lawrence Graham LLP on behalf of its client, Grafton Group.
2. Lawrence Graham LLP ("the complainant") requested recorded information relating to the proposed compulsory purchase of Orchard Wharf, its proposed development and operation by Aggregate Industries and the Greater London Authority's Safeguarded Wharf Review 2011/2012.
3. The Commissioner's decision is that the port of London Authority ("the PLA") has correctly applied regulation 12(5)(b) of the EIR to the information sought by the complainant in its entirety.

Request and response

4. On 20 August 2012 the complainant wrote to the PLA and requested the following information:

"In relation to the proposed compulsory acquisition of Orchard wharf by the PLA

- A copy of the Board Minute of the PLA authorising the use of compulsory purchase powers in relation to Orchard Wharf, together with copies of all reports or memoranda prepared by officers of the PLA in relation to the Order including in particular, but not limited to, details of any site selection process undertaken by the PLA or consultants acting on its behalf, which lead the PLA to conclude that the proposed acquisition of Orchard Wharf was required to enable the PLA to fulfil its statutory function.
- Copies of all communication between the PLA with Aggregate Industries (or any of its related or predecessor companies) arising out of the Safeguarded Wharf Reactivation policy as detailed in paragraphs 5.7 to 5.12 and Appendix 1 of the London Plan Implementation Report "*Safeguarded Wharves on the River Thames*" (January 2005).
- Copies of all communication between the PLA with Aggregate Industries (or any of its related or predecessor companies) in relation to the suitability and availability of alternative wharves and/or sites (being safeguarded wharves or otherwise) that have been considered as potential alternative locations for the development of Orchard Wharf proposed by Aggregate Industries.

In relation to the proposed development and subsequent operation of Orchard Wharf by Aggregate industries (or any of its related and/or predecessor companies)

- Copies of any legal agreements between the PLA and Aggregate Industries (or any of its related and/or predecessor companies including Foster Yeoman and Holcim Group) relating to Orchard Wharf, including in particular but not limited to any agreement relating to the acquisition and/or occupation and/or proposed development of Orchard Wharf.
- Copies of any legal agreements between the PLA and Aggregate Industries (or any of its related and/or predecessor companies) relating to any wharf other than Orchard Wharf, including in particular but not limited to any agreement relating to the acquisition and/or proposed development of such wharf or wharves (if any).
- Copies of any heads of terms or memoranda of understanding (including full details of the financial terms agreed) between the PLA and Aggregate Industries (or any of its related or predecessor companies) relating to any wharf other than Orchard Wharf, including in particular but not limited to any agreement relating to

the acquisition and/or proposed development of such wharf or wharves (if any).

- Copies of any heads of terms or memoranda of understanding (including full details of the financial terms agreed) between the PLA and Aggregate Industries (or any of its related or predecessor companies) relating to Orchard Wharf, including in particular but not limited to any heads of terms or memoranda of understanding relating to the acquisition by Aggregate Industries of an interest in Orchard Wharf (freehold or leasehold) and/or the development by Aggregate Industries of Orchard Wharf.
- Copies of any correspondence between the PLA and Aggregate Industries (or any of its related or predecessor companies) relating to Orchard Wharf, including in particular but not limited to any correspondence relating to the acquisition and/or development of Orchard Wharf.

In relation to the GLA's Safeguarded Wharf Review 2011/2012

- Copies of any correspondence or memoranda between PLA officers and Greater London Authority officers regarding:
 - the selection of Orchard Wharf for continued designation as safeguarded wharf as part of the GLA's *Safeguarded Wharf Review 2011/2012*;
 - other wharves in the North East sub-region as defined including, but not limited to the PLA's comments on (i) the proposed release from safeguarding of Priors Wharf, Mayer Parry Wharf, Sunshine Wharf, Welbeck Wharf, De Pass Wharf and Phoenix Wharf; and
 - the potential compulsory acquisition by the PLA of Orchard Wharf."
5. The PLA acknowledge the complainant's request on 21 August 2012 and made its substantive response on 14 September 2012.
 6. The PLA provided information extracted from the minutes of a number of its board meetings in response to the first bullet point of the complainant's request.
 7. The PLA refused to provide the complainant with the information sought at second and third bullet points of the first section of the request and also the information sought in the second section of the request. The PLA cited regulation 12(5)(e) of the EIR as the grounds for refusing to supply this information.

8. The PLA refused to supply the complainant with the information sought at the third section of the complaint in reliance of regulation 12(4)(d) of the EIR.
9. On 2 November 2012 the complainant asked the PLA to review its decision not to provide the information which was withheld by the PLA in reliance of regulations 12(5)(e) and 12(4)(d). The complainant was content with the minutes which the PLA provided in response to the first bullet point of the request and the PLA was not asked to include this in its internal review.
10. The PLA completed its internal review and wrote to the complainant on 20 December 2012.

The PLA's review

11. The PLA's review determined that the information which attracted regulation 12(5)(e) – the second and third bullet points of the first section of the request and the whole of the second section of the request - was not environmental information falling within the definition provided by regulation 2(1) of the EIR. Therefore, because the PLA is not a public authority for the purpose of the Freedom of Information Act, it is not under any obligation to disclose that information.
12. The PLA considered that should any of the withheld information was found to be commercially sensitive environmental information it would attract regulation 12(5)(e) and having considered the public interest test it concluded that it would be correct to withhold the requested information.
13. The PLA also confirmed its decision to withhold the information sought at the third section of the request in reliance of regulation 12(4)(d).
14. The PLA's review went on to cite two further exceptions to the duty to disclose environmental information which it considered applies to the information requested by the complainant: The PLA identified a number of internal communications within the requested information which it determined would attract regulation 12(4)(e). The PLA also asserted that regulation 12(5)(b) applies to all of the requested information on the grounds that the PLA would soon have to prepare its case for two public enquiries.

Scope of the case

15. The complainant contacted the Commissioner on 21 March 2013 to complain about the way its request for information had been handled.
16. The Commissioner wrote to the PLA on 25 July 2013 to investigate its application of the EIR exceptions applied to the information it had withheld from the complainant.
17. On 19 August the PLA wrote to the complainant with the purpose of seeking an informal resolution to the complaint made to the Commissioner.
18. On 16 October 2013 the complainant wrote to the PLA to confirm that it no longer wished to receive the information it sought at the second section of the request. The complainant confirmed however that it seeks the material covered by the remaining sections of the request on the grounds that the PLA had expressly stated that it had decided to withhold some material.
19. In this notice the Commissioner has considered whether the PLA is entitled to withhold any information from the complainant in reliance of the EIR exceptions it has cited.

Reasons for decision

20. The PLA responded to the Commissioner's enquiries on 1 November 2013. The PLA's letter confirmed its reliance on regulation 12(5)(b) of the EIR as the grounds for withholding of the information sought by the complainant in its entirety.

Regulation 12(5)(b) – the course of justice

21. Regulation 12(5)(b) provides an exception from the duty to disclose information where the disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".
22. The Commissioner considers that the 'course of justice' exception can be applied broadly to a number of circumstances where disclosure of the requested information would result in some prejudicial effect.
23. In the Commissioner's view the exception provided by regulation 12(5)(b) is not limited to investigations and proceedings of either a criminal or disciplinary nature, but may extend to court records and to

information held for the purpose of an inquiry or arbitration. In taking this view the Commissioner is guided by the decision of the Tribunal in *Rudd v the Information Commissioner & the Verderers of the New Forest* (EA/2008/0020) which commented:

“that ‘the course of justice’ does not refer to a specific course of action but is “a more generic concept somewhat akin to ‘the smooth running of the wheels of justice’”.

24. In order to determine whether this exception has been applied correctly the Commissioner must consider whether the withheld information relates to one of the sets of circumstances to which regulation 12(5)(b) may be relevant.
25. The Commission has examined the withheld information and has considered the representations of the PLA in respect of its rationale for refusing to disclose it. He is minded to accept that the information sought by the complainant is relevant to the application of regulation 12(5)(b).
26. He accepts that the withheld information is relevant to the two co-joined public inquiries held in respect of the compulsory purchase of Orchard Wharf and the appeal by Aggregate Industries of the refusal by the London Borough of Tower Hamlets to grant planning permission for the Wharf's development. The fact that there was to be co-joined inquiries was known at the time the complainant made this information request.

Would disclosure of the withheld information result in an adverse effect?

27. The PLA argues that the prejudice to the course of justice in this case stems from its position as a public authority for the purpose of the EIR and therefore the PLA having a general duty to disclose environmental information. It asserts that, in the circumstances of this case, where there is an intended inquiry, the PLA would be placed in an unfair position should it be required to disclose the withheld information by virtue of the EIR, and where the complainant's client is under no such duty.
28. The PLA has explained to the Commissioner that the withheld information constitutes evidence which the PLA would be presenting at the inquiry. It asserts that disclosure of the withheld information under the EIR would place the PLA at a disadvantage to the complainant's client, as Grafton Group is under no obligation which corresponds to that imposed on the PLA by the EIR. Essentially, the PLA would not have the same right to access the information in the possession of Grafton Group.

29. It is a matter of fact that the compulsory purchase of Orchard Wharf and its planned redevelopment was seen to be of such importance as to merit a public inquiry.
30. The public inquiry procedure allows for all aspects of the relevant matters to be examined in detail: The procedure requires that the inquiry is extensively advertised and for all appropriate information to be disclosed in advance. The procedural rules which govern public inquiries apply to third parties as well as the appellant and respondent.
31. The Commissioner understands that, under section 250(2) of the Local Government Act 1972, which applies to compulsory purchase order inquiries, planning inspectors have the power to order any person to produce documents in their possession/control which relate to the inquiry. The PLA informed the Commissioner that the complainant raised this provision with the inspector in an attempt to compel the PLA to disclose some of the withheld information. The Commissioner understands that the inspector declined to do this.
32. In assessing whether regulation 12(5)(b) is engaged, the Commissioner must have regard to the circumstances of the case as they were at the time the request for information was made. The fact that a co-joined public enquiry was to take place in the future is important.
33. In its decision in *Kirkaldie b Information Commissioner & Thanet District Council* (EA/2006/0001) 4 July 2006, the Tribunal stated:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial.”
34. In this case the Commissioner considers that the exception provided by regulation 12(5)(b) can be extended to include the right of an organisation, such as the PLA, to present their position at an inquiry fairly. The Commissioner has decided that disclosure of the requested information, at the time the request was made, would be prejudicial to the PLA's position in respect of the intended inquiry. He considers the nature of this prejudice is the likely disruption the administration of justice – insofar as it relates to the co-joined inquiry, and therefore the Commissioner must conclude that disclosure of the information requested by the complainant properly engages regulation 12(5)(b).
35. The Commissioner considers that disclosure of the requested information under the EIR, in the context of this case, rather than under the procedural rules which govern public inquiries, has the

potential to undermine general confidence in the inquiry system and be detrimental to, what was at the time of the request, an on-going case.

Public interest arguments in favour of disclosure

36. The Commissioner is mindful of the provision of regulations 12(1) and 12(2) of EIR – that environmental information can only be withheld under an exception if, in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest favouring disclosure; and, a public authority shall apply a presumption in favour of disclosure.
37. The Commissioner has considered the arguments advanced by the PLA and those of the complainant contained in the correspondence supplied to the Commissioner. He acknowledges the strong presumption favouring disclosure of environmental information and recognises that disclosure would promote transparency and accountability of the PLA in respect of its general functions and with regard to the reactivation of Orchard Wharf.
38. More specifically, the Commissioner recognises that disclosure of the withheld information could build confidence in the PLA; it could demonstrate that the PLA has acted properly within its powers and has considered all of the implications of its compulsory purchase order and of the planned reactivation of the Wharf.
39. The Commissioner finds that there is a public interest in ensuring that the PLA is accountable for its decisions and is transparent about the way it has reached those decisions. He acknowledges that there is likely to be wide interest in the PLA's proposals, not just from the complainant, but also from the local community and from the wider commercial community.

Public interest arguments in favour of maintaining the exception

40. The Commissioner considers that there is a strong public interest inherent in maintaining the 12(5)(b) exception. He considers that the inquiry process would be compromised if the PLA was to be placed in a weaker position than its opponents in respect of the then intended public inquiry.
41. The Commissioner notes the inquiry procedural rules provide a route for accessing relevant information regarding the PLA's proposals and plans for the compulsory purchase and reactivation of Orchard Wharf. He considers that inquiry procedure has been put in place to ensure fairness and openness for the purposes of public inquiries.

42. The Commissioner recognises that the PLA will always generate and acquire information relevant to its public functions. This information will inevitably concern matters which will result in inquiries. The Commissioner is mindful that disclosure of the withheld information in this case, where it was known that a public inquiry was likely, may inhibit the PLA in its ability to communicate freely and frankly with individuals and organisations in situations of a similar nature. Having said this, the Commissioner would not accept reliance on regulation 12(5)(b) where there is only the slightest contemplation of an inquiry.

Balance of the public interest arguments

43. In this case the Commissioner has concluded that the public interest arguments in favour of maintaining the exception outweigh those in favour of disclosure. In reaching this decision he has acknowledged the public interest inherent in the exception itself and has given weight to adverse effect disclosure under the EIR would have on the ability of the PLA to present its case fairly at the co-joined inquiry that was to take place at the time of the complainant's request.
44. The Commissioner finds that the PLA appropriately relied on regulation 12(5)(b) of the EIR in respect of all of the information requested by the complainant. Having made this conclusion the Commissioner has not gone on to consider the application of the remaining exceptions which the PLA sought to rely on.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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